No. 12398

# United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation

*Appellant.*

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS,
husband and wife,

*Appellees.*

## Reply Brief of Appellant

Appeal from the United States District Court for the District of Idaho. Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

O. R. Baum, Ben Peterson and Darwin D. Brown
*Attorneys for Appellant*
Pocatello, Idaho

GATEWAY PRINTERS — POCATELLO

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## CASES AND AUTHORITIES CITED

## STATUTES

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## Reply Brief of Appellant

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### SUMMARY

Appellant herewith tenders Reply Brief to Brief of Appellees for the reason that appellant feels that there are many things in appellees' brief, as well as in the brief of appellant heretofore filed, that should be called to this Court's attention before the matter is submitted.

The questions to be presented and discussed in this Reply Brief are threefold:

## I.

## POINTS AND AUTHORITIES

Should this Court grant to the appellant a new trial because the verdict of the jury in the trial of the case was excessive?

The S. S. Black Gull—Faye v. American Diamond Lines, Inc. et al., 90 Fed. (2d) 619.

Middleton v. Luckenbach S. S. Co., 70 Fed. (2d) 326.

United States et al. v. Boykin, 49 Fed. (2d) 762.

American R. Co. of Porto Rico v. Santiago et al., 9 Fed. (2d) 753.

Cain v. Southern Ry. Co., 199 Fed. 211.

## II.

Should this Court grant to the appellant a new trial because the Trial Court refused to instruct the jury at the trial of the cause that they, as jurors, did not have any right to take into consideration or make any allowance for the grief and mental anguish of the parents by reason of the death of their minor child?

American R. Co. of Porto Rico v. Santiago et al, 9 Fed. (2d) 753.

Humphreys v. Ash, 6 Atl. (2d) 436.

Gillette Motor Transport, Inc. et al v. Blair et al, 136 S. W. (2d) 656.

Burlington-Rock Island R. Co. v. Ellison et al, 134 S. W. (2d) 306.

Hemsell et al v. Summers et al, 138 S. W. (2d) 865.

Gulf, C. & S. F. Ry. Co. v. Farmer, 102 Tex. 235, Par. 3, 115 S. W. 260.

Hines v. Kelley, Tex. Com. App., 252 S.W. 1033, Pars. 1 to 3.

Houston & T. C. R. Co. v. Gant, Tex. Civ. App., 175 S. W. 745.

Gulf States Utilities Co. v. Dillon, Tex. Civ. App., 112 S. W. (2d) 752, 753, Pars. 1 to 3, and authorities there cited.

Dallas Railway & Terminal Co. v. Boland, Tex. Civ. App., 53 S. W. (2d) 158, 160, Pars. 3 & 4, and authorities there cited.

Sec. 5-311 Idaho Code.

Sec. 5-310 Idaho Code.

Hepp v. Ader, 64 Ida. 240, 130 Pac. (2d) 859.

Wyland v. Twin Falls Canal Co., 48 Ida. 789, 285 Pac. 676.

## III.

Should this Court, in the exercise of sound discretion, though refusing to grant appellant herein a new trial, reduce

the verdict of the jury to an amount commensurate with the measure of damages provided for by law?

The S. S. Black Gull - Faye v. American Diamond Lines, Inc. et al., 90 Fed, (2d) 619.

Middleton v. Luckenbach S. S. Co., 70 Fed. (2d) 326.

United States et al. v. Boykin, 49 Fed. (2d) 762.

American R. Co. of Porto Rico v. Santiago et al., 9 Fed. (2d) 753.

Cain v. Southern Ry Co., 199 Fed. 211.

Hunten v. California-Portland Cement Co., 149 Pac. (2d) 471.

Tyson v. Romey, 199 Pac. (2d) 721.

We feel that the other matters and things set up by the appellant as a basis of its appeal are amply and adequately covered by the original Brief and the appellees' reply thereto.

## ARGUMENT

### I.

### SHOULD THIS COURT GRANT A NEW TRIAL BECAUSE THE VERDICT WAS EXCESSIVE AND IN AN AMOUNT NOT ALLOWABLE BY LAW?

Appellees' Brief cites and calls to this Court's attention a multitude of authorities under each of their various points

and authorities. Appellees take the position that the only basis upon which this Court can grant a new trial to appellant is on account of excessive damages and the Trial Court's failure to grant a new trial upon this ground is an abuse of discretion on the part of the Trial Court.

We have carefully examined appellees' authorities supporting this statement. Some of the authorities cited by appellees do so hold. We found, however, that such holding is academic and the rights of the parties are not determined by the announcement of the rule. The question in this case is not really whether Trial Court abused its discretion in not granting a new trial, the real underlying question is whether or not the Trial Court's refusal to grant a new trial in a case where the verdict was $35,000.00 for the death of an eight year old child is a denial of appellant's substantive rights and hence, within the wording of appellees' cases, an abuse of discretion. Appellees, and we have examined their cases rather carefully, cite no cases from any jurisdiction wherein a verdict of any sizable amount has been upheld, and by "sizable" in this connection we mean an amount even approximating $35,-000.00. Thus it seems to us that appellees in their brief have given this Court no assistance whatsoever in helping this Court determine whether or not the Trial Court's refusal to grant a new trial in the case of a verdict of $35,000.00 is an abuse of discretion.

In our original brief, among other cases, we called this Court's attention to the case of Hunten et al v. California-Portland Cement Co., 149 Pac. (2d) 471. This case is a California case, and we again want to call your attention to

the fact that the California wrongful death statute is identical with the wrongful death statute in Idaho, and by judicial construction the Idaho statute has been construed to include, in the event of a wrongful death, damages for loss of society and companionship as well as any anticipated actual pecuniary contributions during minority. See:

Hepp v. Ader, 64 Ida. 24; 130 Pac. (2d) 859.

The California statute for wrongful death being worded the same as the Idaho statute, see Hepp v. Ader, supra. The California statute has likewise been construed to include an allowance of damages for loss of comfort, society and protection, as well as reasonable expectation of actual pecuniary contributions during minority.

The Idaho Supreme Court, as near as we are able to ascertain, has not in any reported case held what damages under this statute are excessive, and verdicts of as high as $12,000.00 for the death of a minor have been upheld. Apparently no case has come to the Supreme Court of Idaho in which a verdict of an amount near $25,000.00 or $30,000.00 has been decided. California, on the other hand, in construing and applying an identical statute, has laid down in several of its reported cases, a clear and definite rule as to what damages may be allowed in such case.

We again desire to call this Court's attention to the case of Hunten v. California-Portland Cement Co., 149 Pac. (2d) 471. In that case a verdict was rendered by the jury for the death of a minor in the amount of $40,000.00. This verdict

was reduced by the Trial Court to $18,000.00, then the District Court of Appeals of the Fourth District of California held that in the case there was no evidence of pecuniary loss any greater than would be the case with the ordinary boy of that age, and an allowance of $3,000.00 to $4,000.00 for the service of the deceased during the remainder of his minority would have been liberal. The allowance for the value of his comfort, society and protection must bear a reasonable relation to such pecuniary loss as is shown by the evidence and could not be overly liberal, and the California Court held as follows:

> "Taking all these things into consideration we are of the opinion that the amount to which the verdict was reduced by the court is still excessive, and that the largest amount which could be held to find any support in the evidence is $10,000."

In the Hunten v. California-Portland Cement Co. case many other California cases are cited and discussed dealing with the identical subject. We earnestly call such cases to this Court's attention.

The amount of damages allowable, as set forth in the last mentioned case, may be considered modified by the case of Tyson v. Romey, et all, 199 Pac. (2d) 721, in which case, basing their opinion upon the same reason as the Hunten case, a verdict of $18,500.00 was allowed. This verdict had been reduced by the Trial Court from $25,000.00. This case does not change the rule of law nor the measure of damages announced or discussed in the Hunten v. California-Portland

Cement Co. case, supra, but does allow to stand a judgment in the amount of $18,500.00 for the death of the minor child.

## II.

## DID THE TRIAL COURT ERR IN REFUSING TO INSTRUCT THE JURY THAT THEY DID NOT HAVE A RIGHT TO TAKE INTO CONSIDERATION MENTAL GRIEF AND ANGUISH OF THE SURVIVING PARENTS?

There is a direct and positive connection between this question and the question discussed in the previous paragraph, that is, the verdict was excessive and apparently the jury made an allowance to the appellees for the anguish and the mental grief they suffered by reason of the wrongful death of their little boy, Gary. As clearly set forth in our original brief, we call this Court's attention to the fact that we had requested an instruction that the jury was not to consider these matters as an element of damages. This instruction the Trial Court refused to give. We thought that such an instruction was proper and right under the unusual and peculiar circumstances of the instant case. In an action upon a contract where business men are involved, or in almost any other type of litigation, it might be said that it would not be proper for the Court to exclude certain elements of damages from the jury, but in a case of the immediate type, it seems that it follows as the night the day, that when parents of a small boy appear in court and evidence grief and anguish

by reason of the death of their little child, that such feeling and such grief on the part of the parents will naturally be transmitted to the jury, and they in turn will feel the grief and anguish of the parents, and we do not believe it is unreasonable for us to assume that they made a substantial allowance therefor.

In our original brief we cited cases holding that in a case like the one at bar we were entitled to such an instruction, and we respectfully call your attention to cases cited in our original brief upon this question, under Points and Authorities No. I.

## III.

## IF THIS COURT DOES NOT FEEL A NEW TRIAL IS WARRANTED SHOULD IT REDUCE THE DAMAGES TO AN AMOUNT ALLOWABLE BY LAW?

We submit in support of our third point in this brief that should this court feel that the verdict is excessive, but that the entire judgment or verdict should not be lost by appellees, there being in this case no actual proof of evidence of bias or improper motives upon the part of the jury, except the excessiveness of the verdict, we feel that this Court can, under its powers, if it does deny to appellant a new trial, order a new trial in the event appellees refuse to accept a lesser sum, or a sum that, in the judgment of this Court, is proper and just under the circumstances of this particular case.

We therefore respectfully submit that our position in our original brief is correct and that we are entitled to the relief sought in this appeal.

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